NEW YORK LAW SCHOOL

NYLS Journal of International and Comparative Law

Volume 13
Number 2 *Volume 13 Numbers 2 & 3 1992*

Article 9

1992

ARTICLE 177 EEC: A CRITICAL ANALYSIS INTO THE NECESSITY FOR AN EXPANSIVE INTERPRETATION OF "COURT OR TRIBUNAL"

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ARTICLE 177 EEC: A CRITICAL ANALYSIS INTO THE NECESSITY FOR AN EXPANSIVE INTERPRETATION OF "COURT OR TRIBUNAL"

I. INTRODUCTION*

The European Court of Justice ("ECJ" or "Court"), established under the Treaty of Rome,[1] is composed of thirteen judges and six Advocates General.[2] The Court's crucial and unique, if not paramount, feature is its jurisdiction granted by Article 177 EEC.[3] This jurisdiction renders

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* I would like to thank my father, Dr. Zarko Bilbija, for his continued encouragement and support.

1. On March 25, 1957, six european nations signed the Treaty of Rome and formalized the European Economic Community ("EEC" or "Community"). The principles originally promulgated by the European Coal and Steel Community ("ECSC") were preserved, and a Common Market was created. This date also marked the signing of a third treaty, European Atomic Energy Community ("EURATOM"). Although the "Merger Treaty" of 1965 unified the three Communities establishing one Council and one Commission common to all three, the individual functions and powers of the four institutions—Council of Ministers, Commission, Parliament, and Court of Justice—were delineated separately in the three founding Treaties. L. NEVILLE BROWN & FRANCIS G. JACOBS, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES 1 (L. Neville Brown, 3d ed. 1989); STANLEY A. BUDD & ALLAN JONES, THE EUROPEAN COMMUNITY: A GUIDE TO THE MAZE 23 (3d ed. 1989).

2. BUDD & JONES, *supra* note 1, at 43.

3. BROWN & JACOBS, *supra* note 1, at 169; *see* EEC TREATY art. 177, *infra* note 4. Article 177 reads as follows:

> The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
> (a) the interpretation of this Treaty;
> (b) the validity and interpretation of acts of the institutions of the Community;
> (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court

preliminary rulings for courts and tribunals of the European Economic Community ("EEC" or "Community").[4] Thus, as professor Weiler has emphasized, "[i]t is common knowledge that Article 177 and the tandem relationship it establishes between the European Court and Member State courts has been the most fundamental element in the constitutional architecture of the European Community legal order."[5] The difficulties in defining the bodies that may be classified as a "court or tribunal," and thus have the legal right to avail themselves of the referral power conferred under Article 177 EEC, is the essence of this note.

Procedurally, the application of Article 177 EEC is akin to an interlocutory ruling. A member state's national court must first decide whether a litigant has raised a question of Community law. Second, the member state's court must then consider whether an ECJ ruling on the issue is necessary before the national court may render judgment; if so, the national court may, and in some cases must,[6] stay its proceedings and refer the question to the ECJ for a preliminary ruling. The ECJ then rules on the question, and the referring court applies the ECJ's ruling to the case pending before it.[7]

Through this procedure, the ECJ, which is the final authority on Community law, ensures the uniform interpretation and application of Community law and provides guidance to a national court when it has been requested to do so.[8] The ECJ's guidance prevents diverging interpretations of EEC law.[9] The lack of uniform interpretation and application of EEC law "would threaten the very foundations of the Community and its legal system. It is essential, therefore, that there should be a single court with ultimate authority to determine these questions of Community

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of Justice.

4. Treaty Establishing the European Economic Community [EEC Treaty] art. 177, 298 U.N.T.S. 3, 76-77.

5. Joseph H. Weiler, *The European Court, National Courts and References for Preliminary Rulings—The Paradox of Success: A Revisionist View of Article 177 EEC, in* ARTICLE 177 EEC: EXPERIENCES & PROBLEMS 366 (Henry G. Schermers et al. eds., 1987) [hereinafter EXPERIENCE].

6. When "any such question is raised in a case pending before a court . . . against whose decisions there is no judicial remedy under national law, that court or tribunal *shall* bring the matter before the Court of Justice." EEC TREATY, *supra* note 4, at art. 177, para. 3 (emphasis added).

7. 3 Common Mkt. Rep. (CCH) ¶4656 (1989).

8. K.P.E. LASOK, THE EUROPEAN COURT OF JUSTICE, PRACTICE AND PROCEDURE 46 (1984).

9. *See* BROWN & JACOBS, *supra* note 1, at 173.

law—that authority is conferred on the European Court of Justice by Art. 177."[10]

The ECJ places emphasis on the unlimited right of *all* courts and tribunals to refer a question of interpretation of Community law to the ECJ whenever *they* consider that a preliminary ruling is necessary to enable them to give judgment. This raises a crucial threshold issue: Which adjudicatory authorities qualify as a "court or tribunal" for the purpose of Article 177?[11]

Two polar views, one restrictive, the other expansive, have been offered concerning that question. The restrictive interpretation, proposed primarily by the United Kingdom, is that only appellate courts should be authorized to refer questions of interpretation to the ECJ.[12] The expansive view is shared by those who believe that non-judicial bodies should, when applying Community law, also have the ability to refer preliminary questions to the Court.[13]

This note reaches two conclusions after it explores the different motives and divergent goals of the proponents of the opposing views. First, the uniform application of Community law can be sustained only if the legal community construes Article 177 EEC as broadly as possible. That is, all administrative and regulatory bodies, which in effect are the primary interpreters of Community law, must be allowed to refer questions to the ECJ. Second, given the variety of judicial structures of member states, an absolute restriction of referral power to appellate courts or courts of last instance alone is not viable. Rather, the assessment of whether or not the referral power through Article 177 EEC is available to a particular adjudicatory authority must be made on a case-by-case basis.

II. THE CURRENT SCOPE OF ARTICLE 177 EEC

The ECJ has interpreted the clause "court or tribunal" to include non-judicial bodies to the extent that they resemble judicial courts.[14] The

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10. 3 Common Mkt. Rep. (CCH) ¶4656 (1989).

11. GREG G. MYLES, EEC BRIEF, COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES § 15 (1986 update).

12. 5 HANS SMIT & PETER HERZOG, THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY—A COMMENTARY ON THE EEC TREATY 456 (Columbia Law School Project on European Institutions 1988).

13. Henry G. Schermers & J.S. Watson, *Report of the Conference, in* EXPERIENCES & PROBLEMS, *supra* note 5, at 4, 6 [hereinafter *Report*].

14. *See generally* Case 109/88, Handels-OG Kontorfunktion Aeremes Forbund I Danmark (Union of Clerical and Commercial Employees) v. Dansk Arbejdsgiverforening

ECJ's guidelines for interpreting "court or tribunal" are derived primarily through three leading cases[15]: The first, *Vaassen*,[16] permitted an arbitration tribunal to submit questions to the ECJ. The second, *Broekmeulen*,[17] permitted an appeals committee that governed the registration of physicians to submit questions to the ECJ. The third, *Nordsee*,[18] refused to permit an arbitrator to submit questions to the ECJ. The guidelines set forth by *Vaassen*, *Broekmeulen*, and *Nordsee*, which are still applicable today, are well summarized by the Court in *Handels*:

> The definition of court or tribunal under Community law presupposes an independent body which is called upon to hear and determine disputes. The court or tribunal must be set up on a statutory basis as a permanent institution. Its jurisdiction must be mandatory and it must be called upon to apply rules of law in order to give decisions in contentious proceedings.[19]

The Court's four criteria effectively encapsulate "court or tribunal" to approximate, as closely as possible, a traditional judicial court.

Despite the final result in *Nordsee*, the ECJ did not categorically exclude arbitrators as a class from the bodies entitled to refer questions to the ECJ through Article 177 EEC.[20] Instead, the jurisdiction of the ECJ depends on the nature of the arbitration in question. The factors considered in *Nordsee* were whether the parties voluntarily submitted to arbitration, whether the national law conferred an obligation on private individuals to submit to arbitration under the particular circumstances, and whether the national courts are able to examine questions of Community law raised in arbitration, for example, through collaboration, review, and

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(Danish Employers' Association) ex parte Danfoss A/S, 1 C.M.L.R. 8 (1989).

15. *See* A. E. Kellerman & J. S. Watson, *Documentation on the Preliminary Procedure* [hereinafter *Documentation*], *in* EXPERIENCES AND PROBLEMS, *supra* note 5, at 403, 410-11.

16. Case 61/65, G. Vaassen (née Göbbels) v. Bestuur van hat Beambtenfonds voor het Mijnbedrijf, 1966 E.C.R. 261, 1966 C.M.L.R. 508.

17. Case 246/80, C. Broekmeulen v. Huisarts Registratie Commissie, 1981 E.C.R. 2311, 1 C.M.L.R. 91 (1982).

18. Case 102/81, Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG, 1982 E.C.R. 1095.

19. Case 109/88, Handels-OG Kontorfunktion Aernes Forbund I Danmark (Union of Clerical and Commercial Employees) v. Dansk Arbejdsgiverforening (Danish Employers' Association) ex parte Danfoss A/S, 1 C.M.L.R. 8 (1989).

20. *Report*, *supra* note 13, at 6.

enforcement. Simply stated, the national court or tribunal must, in the course of its auxiliary or supervisory functions, decide the extent to which it is necessary to refer to the ECJ the question raised.[21]

Many arguments have been advanced to advocate including arbitrators in the subset of referring bodies.[22] Litigants in Community law are moving toward arbitration for final determination of disputes; courts are attempting to limit the possibilities of appeal from arbitration.[23] Thus, efficiency would dictate inclusion.

In addition to arbitral tribunals, "national bodies responsible for interpreting Community law[,] even though they cannot be regarded as judicial authorities under national law," should be included among those bodies which may avail themselves of Article 177 EEC.[24] Furthermore, some of these non-judicial bodies "definitively settle a case where a question of Community law is involved."[25] Taking it even one step further, "certain important laws and regulations, especially in economic matters, are enforced with the help of advisory bodies, which are without judicial powers but whose opinions will have a decisive impact on administrative decisions and/or future procedures or developments in procedure."[26]

Thus, two goals are cited as underlying the policy decisions of the ECJ. The first, being to develop the law and the second to interpret and apply community law uniformly. Depending on which one is accepted, the demarkation of extension of Article 177 EEC could stop at various points. If the goal is to develop the law,[27] the referral power should arguably be

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21. *See* Case 102/81, Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG, 1982 E.C.R. 1095.

22. *See* Clive M. Schmitthoff, *Arbitration and EEC Law*, 24 COMMON MKT. L. REV. 143 (1987); Gerhard Bebr, *Arbitration Tribunals and Article 177 of the EEC Treaty*, 22 COMMON MKT. L. REV. 489 (1985).

23. *Report*, *supra* note 13, at 6.

24. Adrey Bos, *Notes on the Role of the State in the Procedure Pursuant to Article 177 of the Treaty Establishing the European Economic Community*, *in* EXPERIENCES AND PROBLEMS, *supra* note 5, at 272, 275.

25. A. Deringer, *Some Comments by a German Advocate on Problems Concerning the Application of Article 177 EEC*, *in* EXPERIENCES AND PROBLEMS, *supra* note 5, at 210, 212.

26. A. Desmazieres de Sechelles, *Experiences and Problems in Applying the Preliminary Proceedings of Article 177 of the EEC Treaty of Rome, as seen by a French Advocate*, *in* EXPERIENCES AND PROBLEMS, *supra* note 5, at 148, 152.

27. *See Generally* BROWN & JACOBS, *supra* note 1, at 178-79; R. Vob, *Experiences and Problems in Applying Article 177 of the EEC Treaty—From the Point of View of a German*

restricted to judicial bodies that make law. However, if the goal is to interpret and apply Community law uniformly—which is, in fact, the case[28]—then all bodies that interpret or apply Community law should be allowed to refer questions to the ECJ. This later category extends from hearing panels to administrative bodies.

III. RESTRICTING "COURT OR TRIBUNAL" TO APPELLATE COURTS OR COURTS OF LAST INSTANCE

There does not seem to be any way to reconcile the opposing views about the most effective stage of given proceedings at which to refer a question, using Article 177 EEC, to the ECJ.[29] Under case law, referrals should be within the sole discretion of the national court.[30] The point in dispute, however, is whether referral power should be reserved exclusively to courts of intermediate appellate jurisdiction or courts of last instance. The position taken by the United Kingdom is that, indeed, the power of referral ought to be so limited.[31] Most notable is Lord Denning's opinion and guidelines regarding the use of Article 177 EEC in *Bulmer v. Bollinger.*[32]

Judge, in EXPERIENCES AND PROBLEMS, *supra* note 5, at 55, 67.

28. C.W.A. Timmermans, *Concluding Remarks, in* EXPERIENCES & PROBLEMS, *supra* note 5, at 47, 50; M. Seidel, *Experiences of the Government of the Federal Republic of Germany with Article 177 References, in* EXPERIENCES & PROBLEMS, *supra* note 5, at 239.

29. *Report, supra* note 13 , at 4.

30. Joined cases 36 & 71/80, Irish Creamery Milk Suppliers Association and Others v. Government of Ireland and Others; Martin Doyle and Others v. An Taoiseach and Others, 1981 E.C.R. 735, 2 C.M.L.R. 455 (1981).

31. 5 SMIT & HERZOG, *supra* note 12, at 456.

32. The guidelines are as follows:
First, on whether a decision is necessary:

(1) The point must be conclusive. The test set forth is akin to the 'outcome determinative' test in the United States. The judgment depends directly upon the interpretation of the point of law submitted for interpretation.

(2) No previous ruling on point. If the same or substantially the same point has already been decided by the European Court, it is not necessary to refer it unless the English court believes the previous decision is wrong or unless "there are new factors which 'ought to be brought to the notice of the European Court.'"

(3) Acte Claire doctrine. If the point is "reasonably clear and free from doubt," all that remains is applying the EEC legal proposition at issue, and that is the job of the English court. There is no need for interpretation; therefore, a reference is not necessary.

(4) All the facts must be ascertained first.

Second, on whether the court should exercise its discretion if the condition of necessity is fulfilled:

A. In Favor of Limitation to Courts of Appeal

In general, advocates of limited-referral rely on three suppositions in support of their view. First, relevant facts are not substantiated until the appellate stage has been reached. Second, the need for a preliminary ruling will crystallize only after the case has been subject to the judicial process in a court of first instance. Third, judges presiding over higher courts are better able to understand and formulate the question at issue.[33]

1. Facts

It is undisputed that the facts pertaining to a case are to be established by the national court[34] while the competence of the ECJ is limited to the question of Community law referred to it.[35] The ECJ confirmed this division of labor in *Oehlschager*, in which it explicitly ruled that verifying facts submitted by a national court is not within the competence of the ECJ under Article 177 EEC.[36] Furthermore, for a national court to conclude that a referral is necessary to enable it to pass judgment, the facts must be ascertained first.[37]

Alternatively, the ECJ is supposed to "operate in a sort of factless vacuum"[38] during Article 177 EEC proceedings. History, however, has

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(1) Time to get a ruling. When expediency is more important, such as in a case seeking an injunction, the court should interpret on its own.

(2) Keep the workload of the European Court to a minimum.

(3) Formulate the question clearly. The English court should find the facts, state them clearly, and formulate the question as one confined to interpretation.

(4) Unless the point is difficult and important, it would be preferable for the English judge to decide it rather than to refer.

(5) Expense to the parties of getting a ruling from the European Court.

(6) Defer in part to the wishes of the parties. If both parties wish to defer, the English court should consider this but should not give it excessive weight. If one party expressly does not want to refer, the English court should "hesitate" due to the expense and delay involved in making a reference. H P Bulmer Ltd. and Shhoerings Ltd. v. Bollinger SA and Champagne Lanson Pere et Fils, 1974 Ch. 401, 3 W.L.R. 202 (1974), 2 All E.R. 1226 (1974).

33. *Report, supra* note 13, at 4-5.

34. T. Koopmans, *The Technique of the Preliminary Question—A View From the Court of Justice, in* EXPERIENCES & PROBLEMS, *supra* note 5, at 327, 329.

35. LASOK, *supra* note 8, at 46.

36. Case 104/77, Firma Wolfgang Oehlschlager v. Hauptzollamt Emmerich, 1978 E.C.R. 791.

37. Vob, *supra* note 27, at 60.

38. D.A.O. Edward, *The Problem of Fact-Finding in Preliminary Proceedings Under*

indicated that the ECJ is often compelled to consider facts.[39] Most questions of law referred to the ECJ are virtually meaningless without the applicable factual background.[40] As a result, the ECJ itself "*does* investigate facts because, for practical reasons, it must do so if it is to do its job efficiently and avoid unnecessary delay."[41] Thus, a mechanism requiring cases to go through a full initial proceeding in a court of first instance, in which all relevant facts are ascertained, would heighten the efficiency of the ECJ.

2. Necessity of Referral

In *R. v. Plymouth Justices, ex parte Rogers*, Lord Chief Justice Lane elucidated the superior ability of higher courts to analyze the facts presented to them and to decide on the necessity of the referral:

> [I]n the ordinary way justices should exercise considerable caution before referring even after they have heard all the evidence. If they come to a wrong decision on Community law, a higher court can make the reference and frequently the higher court would be the more suitable forum to do so. The higher court is as a rule in a better position to assess whether any reference is desirable.[42]

Lord Lane implies that lower-court judges are not sufficiently familiar with Community law,[43] are inexperienced in procedural matters,[44] and are unable to understand the "full socio-economic" history of the issues.[45]

Article 177 EEC, in EXPERIENCES & PROBLEMS, *supra* note 11, at 216, 217.

39. *Id.* at 218.

40. *See id.* at 217-18.

41. *Id.* at 217.

42. R. v. Plymouth Justices, ex parte Rogers, 1982 Q.B. 863 (Eng. C.A.), 3 W.L.R. 1 (1982), 2 All E.R. 175 (1982).

43. Vob, *supra* note 27, at 66.

44. F. Herbert, *Article 177 EEC: The Experiences of the Parties in Belgium, in* EXPERIENCES & PROBLEMS, *supra* note 5, at 195, 198; A. Saggio, *Italian Experience in the Application of Article 177 of the EEC Treaty, in* EXPERIENCES & PROBLEMS, *supra* note 5, at 109; Aristidis Calogeropoulos, *The Greek Courts and the Preliminary Reference Procedure According to Article 177 of the EEC Treaty: Some Remarks, in* EXPERIENCES & PROBLEMS, *supra* note 5, at 122, 124.

45. *See Report, supra* note 13, at 5 (excerpt from Rasmussen's comments made during the conference).

These so-called "shortfalls of lower courts" have been adamantly disputed.[46]

Notwithstanding the widespread acceptance of the basic premises enumerated above, it cannot be denied that their applicability varies from one member state to the next.[47] Suggestions of global reform are criticized for erroneously presupposing that problems of application and procedure of Article 177 EEC are "uniform across the board."[48] Professor Weiler, for example, emphasizes that instead of a "homogeneous legal order," the reality is that "the geometry of 'Judicial Europe' is distinctly variable."[49] The differences are self-evident, both among[50] the member states and within[51] them. The obvious solution to this judicial imbalance, which by its nature hinders the uniform legal growth of the Community, is to encourage more referrals from newer member states and from the less experienced courts.[52] Moreover, given the ongoing integration of the Common Market, it would be most productive to educate all parties concerned, including, undoubtedly, judges of courts of first instance.[53]

3. Better Formulation of Question

Framing the question for referral is often considered to be more difficult than obtaining the answer.[54] One reason why this is so is

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46. *See generally Report, supra* note 13, at 5; Gerhard Bebr, *The Preliminary Proceedings of Article 177 EEC—Problems and Suggestions for Improvement, in* EXPERIENCES & PROBLEMS, *supra* note 5, at 345, 354; Deringer *supra* note 25, at 212.

47. *See generally Introduction,* in EXPERIENCES & PROBLEMS, *supra* note 5, at XXXI-XXXII; *Report, supra* note 13, at 4.

48. Weiler, *supra* note 5, at 371.

49. *Id.*

50. *Id.* "Differences are clear *among* the Member States: one cannot compare—or rather one can compare, but not equate—the situation as regards Article 177 as between, say, the Netherlands on the one hand and Greece, or, for that matter Portugal on the other."

51. *Id.* "Differences are also clear *within* or *across* Member State lines: one cannot equate the situation of some of the fiscal and commercial courts—the 'repeat players' of the system—called upon to apply Community law as a matter of growing routine, and the 'one-shot players' such as, say, a local magistrate faced once, in a career otherwise consisting of fining drunkards and dealing with petty crime, with an issue of Community law."

52. *Id.* Weiler suggests on in this essay that as regards the more experienced courts, revision may, in fact, be justifiable. *See id.*

53. *See* GREG MYLES, 1 EEC BRIEF, COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES § 18 (1986 update).

54. *See generally Report, supra* note 13, at 12-16.

because the role of the ECJ is strictly one of interpretation, there is an inherent element of abstraction in the entire process of using Article 177 EEC.[55] The national judge must formulate the question in such a fashion that the governing principle is comprehendible to the ECJ. The ECJ, in turn, will supply an answer in the format of an abstract legal principle.[56] Essentially, the national judge must travel the analytical spectrum from specifics to abstraction, and then back again, from abstraction to specifics.[57]

This premise, the alleged inadequacy of lower court judges, implies that more experienced judges, presumably sitting on higher courts, will be more adept at this process. Lord Lane, in discussing the appropriateness of lower courts to make references, wrote that "[o]n references the form of the question is of importance and the higher court will normally be in a better position to assess the appropriateness of the question and to assist in formulating it clearly."[58] This assertion loses some credibility when coupled with the parties' active participation in drafting questions in English courts.[59] In fact, the very nature and form of the questions often become a disputed issue between the two parties.[60] Thus, the task of formulation does not fall solely into the laps of judges. Consequently, deficiencies, if any, in the bench are rectified through the involvement of attorneys who are often more familiar than some of the judges with Community law.[61]

Although the higher courts of many Member States submit sophisticated questions,[62] the degree to which the end result contributes to the

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55. *See* Vob, *supra* note 27, at 66-67.

56. *See id.* at 66.

57. *See id.*

58. R. v. Plymouth Justices, ex parte Rogers, 1982 Q.B. 863 (Eng. C.A.), 3 W.L.R. 1 (1982), 2 All E.R. 175 (1982).

59. *Report, supra* note 13, at 12.

60. A. Lester, *QC, The Uncertain Trumpet References to the Court of Justice from the United Kingdom: Equal Pay and Equal Treatment Without Sex Discrimination, in* EXPERIENCES & PROBLEMS, *supra* note 5, at 164, 192.

61. *Report, supra* note 13, at 13.

62. Corte di Cassazione is praised for the high technical quality of the submits preliminary references. Specifically, among the most important are the order of 21 May 1981 in SIOT v. Ministero delle Finanze (Case 266/81, Judgment of 16 March 1983, 1983 E.C.R. 731), the three orders dated 25 March 1981 in Ministero delle Finanze v. Societa Petrolifera Italia and Ministero delle Finanze v. Societa Michelin Italiana (Joined Cases 267-269/81, Judgment of 16 March 1983, 1983 E.C.R. 801), and the order of 27 May 1981 in CILFIT and others v. Ministero della Sanita (Case 283/81, Judgment of 6 October 1982,

overall development of Community law[63] is disputable. Are the questions more advanced, resulting in an efficient use of the system? On the other hand, are the questions too technical and narrowly tailored to the case at bar, thereby not contributing to Community law?

Opinions conflict regarding the proper goal to be pursued when drafting a question for referral. There is support for seeking both a statement of principle and for seeking a concrete ruling.[64] Because the answer provided by the ECJ is only binding on the referring court and the case at bar,[65] obtaining a concrete ruling may be the preferable goal. The ultimate purpose of Article 177 EEC is, however, to ensure uniform interpretation and application of Community law.[66] To this end, an answer confined to a more general statement of principle, applicable to similar cases and issues not only within the referring member state but also across its borders, is better. The latter route would ensure procedural economy, promote legal certainty, and facilitate the predictability of judicial decisions.[67]

B. Against the Limitation to Courts of Appeal

As a general proposition, limiting the referral power to courts of appeal has been adamantly opposed by participants and commentators within the EEC legal system.[68] Both practical and theoretical arguments support permitting courts of first instance to avail themselves of Article 177 and to refer questions of interpretation to the ECJ.

The practical arguments revolve around expediency and cost-efficiency. The theoretical arguments center around concepts of principle and judicial fairness and economy. These arguments, jointly and severally, outweigh the converse arguments in support of the limitation outlined above.

1982 E.C.R. 3415).

63. Most commentators and participants, except the British, share the overall objective of development of Community law. In fact, Sir Anthony Lincoln of the High Court of Justice in London takes the view that, in making a preliminary reference, a court should be concerned only with the case pending before it and with making law. *Report, supra* note 13, at 14.

64. *Report, supra* note 13, at 13.

65. BROWN & JACOBS, *supra* note 1, at 319.

66. LASOK, *supra* note 8.

67. *Report, supra* note 13, at 13-14.

68. *See generally Report, supra* note 13, at 4-6; Bebr, *supra* note 46, at 354.

1. Practical Arguments

Expediency[69] and cost-efficiency[70] dominate the practical arguments. Central to these arguments is that if a referral is necessary, it should be made as soon possible. Moreover, the parties should not be forced to appeal to a higher domestic court solely for the purpose of obtaining the referral essential to the outcome of the case.[71] On occasion, this principle is applicable even before the lower courts fully determine the relevant facts. The ECJ set forth this principle in *Irish Creamery:*[72] "[W]here the national court cannot, without a ruling of this Court, be sure what the relevant issues of fact, if any, are,"[73]then referrals before the facts are determined may be justified. At this extreme lies a rather narrow subset of cases. In sum, the referral should be made as soon as the potential referring body ascertains sufficiently what appear to be the pertinent facts.[74]

2. Theoretical Arguments

In addition to expediency and cost-efficiency, concepts of principle, judicial fairness, and judicial economy support the need to read Article 177 expansively. Limiting the right of lower courts to refer questions to the ECJ is wrong as a matter of principle. In addition, judicial fairness and economy is undermined by preventing the trial courts from interacting directly with the ECJ. The theoretical arguments in favor of a direct relationship between the lower courts and the ECJ outweigh the arguments for limitation.

a. As a Matter of Principle

To restrict the right of lower courts to interact with the ECJ would alter the "scope of the preliminary ruling procedure."[75] Furthermore, it

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69. A. Deringer, *supra* note 25.

70. *Report, supra* note 13, at 9.

71. *Report, supra* note 13, at 4.

72. Joined cases 36 & 71/80, Irish Creamery Milk Suppliers Association and Others v. Government of Ireland and Others; Martin Doyle and Others v. An Taoiseach and Others, 1981 E.C.R. 735, 2 C.M.L.R. 455 (1981).

73. Joined cases 36 & 71/80, Irish Creamery Milk Suppliers Association and Others v. Government of Ireland and Others; Martin Doyle and Others v. An Taoiseach and Others, 1981 E.C.R. 735, 2 C.M.L.R. 455 (1981).

74. R.A.A. Duk, *Some Remarks of a Dutch Advocate on the Preliminary Procedure of Article 177 EEC, in* EXPERIENCES & PROBLEMS, *supra* note 5, at 204, 205.

75. Vob, *supra* note 27, at 67.

would be wrong as a matter of principle[76] and would also result in restricting the jurisdiction of the ECJ.[77] The weight of this argument is further reflected in the development of Community law. Two prime examples are the repeal of a Greek statute[78] at the explicit request of the Commission and the well known *Rheinmuhlen*[79] case.

The first request for a preliminary ruling from the highest Greek court, the plenary session of the Greek Council of State, arose from a case brought initially before the fourth chamber of the Council of State, a lower court. The chamber applied Greek Law No. 1470/1984, Article 1(5), which provided that "[t]he reference of a case to the plenary session [of the Council of State] is . . . mandatory when the chamber considers that the Court of Justice of the European Communities should be asked for a preliminary ruling."[80] Accordingly, the case was referred to the plenary session, which in turn requested a preliminary ruling from the ECJ.[81] The EEC Commission found that the obligation to refer a case to a higher court instead of requesting a preliminary ruling directly from the ECJ is inconsistent with the requirements of Article 177 EEC. Accordingly, the Commission requested that the law be repealed. As a direct result of the request, the Greek law requiring lower courts to refer cases involving EEC law to the plenary session was repealed.[82]

In *Rheinmuhlen*, the ECJ addressed the question "whether, under Article 177, a lower Court has a completely unfettered right to refer questions to this [ECJ] Court or whether that Article leaves unaffected rules of national law to the contrary."[83] Advocate General Warner decided on the former: Article 177 EEC confers on lower courts or tribunals of Member States a completely unfettered right to referral. In rejecting a portion of Advocate General Romer's opinion in *Chanel*,[84]

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76. *Report, supra* note 13, at 5.

77. *Id.*

78. *The Attitude of National Supreme Courts to Community Law* [hereinafter *Attitude*], European Information Service, Jan., 1990, *available in* LEXIS, Nexis Library, EURINT File.

79. Case 166/73, Rheinmuhlen-Dusseldorf v. Einfuhr-und Vorratsstelle fur Getreide, 1974 E.C.R. 33, 1 C.M.L.R. 523 (1974).

80. *Attitude, supra* note 78 (quoting Greek Law No. 1470/1984, Article 1(5)).

81. *Id.*

82. *Id.*

83. Case 166/73, Rheinmuhlen-Dusseldorf v. Einfuhr-und Vorratsstelle fur Getreide, 1974 E.C.R. 33, 1 C.M.L.R. 523, at 524-25 (1974).

84. The ECJ deferred delivering judgment pending the outcome of a national appeal

Advocate General Warner pointed to an extension of Advocate General Romer's reasoning that would give "to a national appellate Court the last word on the question whether a particular case gives rise to a question of Community law. That must mean in certain circumstances . . . giving to that Court rather than to this Court the last word as to the scope of Community law."[85] Advocate General Warner further stated that any qualification by the national laws of member states on the "unqualified terms of Article 177" would be objectionable to the ECJ.[86] As professor Mitchell stated succinctly, "*Rheinmuhlen* not *Bulmer* must rule."[87]

In light of these examples, a limitation on the lower national courts' accessibility to Article 177 EEC is contrary to the principles of Community law.

b. Judicial Fairness and Judicial Economy

Additional arguments in support of referrals by courts of first instance rest on promoting judicial economy. Clarifying the issues of Community law pertinent to each case occurs during the initial stages of a legal proceeding, when the referral is made by the court of first instance.[88] In addition, the higher courts, often lacking enthusiasm in initiating referrals to the ECJ, are already bound by any preliminary ruling previously requested by a lower court.[89] It follows that allowing lower courts to make referrals ensures that all necessary questions of interpretation will in fact reach the ECJ.

If one assumes that national courts will adhere strictly to Article 177 EEC,[90] a truly necessary question will be referred, at the latest, by the highest national court. This view, however, is often unrealistic.[91] Initially, supreme national courts were reluctant to defer questions of interpretation to an outside court whose decisions would be binding on

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against the reference. Case 31/68, Chanel v Cepeha, 1970 E.C.R. 403.

85. Case 166/73, Rheinmuhlen-Dusseldorf v. Einfuhr-und Vorratsstelle fur Getreide, 1974 E.C.R. 33, 1 C.M.L.R. 523, at 528-29 (1974).

86. *Id.*

87. GREG MYLES, 1 EEC BRIEF, COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES §18 (1986 update)(quoting J.D.B. Mitchell, *Sed Quis Custodiet Ipsos Custodes?*, 11 COMMON MKT. L. REV. 355 (1974)).

88. Bebr, *supra* note 46, at 354.

89. *Id.*

90. EEC TREATY, *supra* note 4, at art. 177, para. 3.

91. *See generally Attitude, supra* note 78.

them.[92] Although most of this direct resistance has dissipated, more subtle forms of resistance, such as abuse of the acte clair doctrine, have emerged and persisted.[93]

The capability of lower courts to use Article 177 EEC efficiently is often questioned.[94] It is argued, however, that not only are the lower courts "perfectly capable" of effectively utilizing Article 177 but, furthermore, that many decisions resulting from these referrals have significantly contributed to the development of Community law.[95] One possible reason for this is the seemingly general tendency for lower courts to make referrals on fundamental, rather than technical, issues of Community law.[96] The decisive role of the lower courts has also been looked upon favorably because "in the legal architecture of the Community *all* national courts, when confronted with Community issues become, willy nilly, Community courts. Community law has correctly been perceived as 'belonging' exclusively neither to specialized courts nor to appeal or constitutional courts."[97]

To summarize, preserving the intentions behind Article 177 EEC, both as a matter of principle as well as a matter of practicality, require that any hierarchical limitation on the use of the referral procedure be rejected.[98]

C. No Hierarchical Limitation on the use of Article 177 EEC is Possible

A conclusion shared by many who have grappled with the questions posited here is that no absolute rule limiting referral power, through Article 177 EEC, is viable. Some authorities suggest that the ultimate factor should concern the sector involved as opposed to the particular level of the judicial hierarchy.[99] Abusing the broad discretion granted to national courts permeates all levels of the courts. Lower courts that do not wish to follow the case law of a higher court may refer a question to the ECJ in hopes that an interpretation by the ECJ will add credibility to their

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92. *Attitude, supra* note 78, at 108.

93. *Id.*

94. *See generally Report, supra* note 13, at 4-6.

95. *Report, supra* note 13, at 5.

96. Bebr, *supra* note 46, at 354.

97. Weiler, *supra* note 5, at 367.

98. *See generally id.*

99. Duk, *supra* note 74, at 205; *Report, supra* note 13, at 5 (excerpt from comments made by Herbert during the conference).

decision.[100] To avoid this roundabout fashion of usurping the authority by lower courts, higher courts also make referrals which are not, strictly speaking, necessary.[101]

It is also posited that "the timing [of referrals] is never right."[102] Moreover, perhaps most importantly, the diverse cultures, the judicial structures, and the legal developments in the Community's twelve member states impede absolute, general, restrictions of this nature.[103]

D. Conflicting Goals and Motivation of Opposing Proponents

The stated goals of the two proposals for the best use of Article 177 EEC are as diametrically opposed as the proposals themselves. Shifting the referral procedure to appellate courts would presumably reduce the case load before the ECJ. Consequently, the Court could then target its resources to primary and fundamental issues of Community law.[104] There is no debate on the two-fold advantages to be gained from easing the workload of the Court. The first is that time delays will be reduced. The second is that the ECJ will gain a heightened credibility; the normative effect will increase, the "specific gravity" of each judgment will be heightened, and the ECJ will be better able to continue to conform to the high judicial standard it has established.[105] The debate here is not over the desired end; instead, it is over whether the ends justify the means.

Those opposed to the limitation on referral power stress the preservation of the purpose of Article 177 EEC and offer alternative solutions to ease the workload of the ECJ. Some proposals include giving a power of *certiorari* to the ECJ,[106] allowing lower courts to take some of the

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100. Vob, *supra* note 27, at 67-68.

101. *Id.* at 69.

102. I. Verougstraete, *Article 177 EEC: A View From the Belgian Judiciary, in* EXPERIENCES & PROBLEMS, *supra* note 5, at 128, 130.

103. *Report, supra* note 13, at 4 (excerpt from Weiler's statements made during the conference).

104. Bebr, *supra* note 46.

105. BROWN & JACOBS, *supra* note 1, at 326; Weiler, *supra* note 5, at 368-69.

106. Rasmussen strongly urges this option as one viable for implementation in the European setting, after that establishing it is the most important form of docket-control available to the U.S. Supreme Court. Hjalte Rasmussen, *Issues of Admissibility and Justiciability in EC Judicial Adjudication of Federalism Disputes Under Article 177 EEC, in* EXPERIENCES & PROBLEMS, *supra* note 5, at 379, 381.

cases,[107] and referring lower courts to other cases that have interpreted similar issues.[108] Alternatively, "practical difficulties cannot stand in the way of a proper application of Community law."[109]

The text of several opinions, however, indicate that the underlying motive behind limiting referrals to higher courts may be altogether different from the stated goal. Issues of judicial sovereignty and, when applicable, precedent come forward.

1. Judicial Sovereignty

A perceived threat of impinging on the ultimate authority of higher courts is evident.[110] In *Rheinmuhlen*, the plaintiff's argument implied that the Hessisches Finanzgericht, the referring court, which, bound by national law to accept the views of the Bundesfinazhof, was "seek[ing] to escape from them by invoking the jurisdiction of this [ECJ] Court."[111] The Bundesfinazhof's order for referral reflects this concern. In rejecting the implication, the Court first acknowledged that lower courts should "respect and be loyal to the decisions of Courts that are superior to it."[112] Notwithstanding this general principle, the lower court was "not seeking to directly substitute its own view for that of the superior national Court."[113] Rather, the lower court was seeking to clarify an issue of Community law from the only court competent to rule definitively on it—the ECJ.

In *Bulmer*, Lord Denning argued for discretion to all English courts, save the House of Lords, in deciding whether or not a referral through

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107. Article 168A already accomplishes this by creating a court of first instance whose decisions are subject to a right of appeal to the ECJ on points of law. This court, however, "shall not be competent to hear and determine . . . questions referred for a preliminary ruling under Article 177." EEC TREATY, *supra* note 4, at art. 168A. Thus, although the court of first instance will ease the workload of the ECJ, this will not affect the number of questions submitted to the ECJ through Article 177 EEC—which only the ECJ is competent to adjudicate. *See id.*

108. *See* M.R. Mok, *Experiences of the Netherlands Courts in Applying the Preliminary Proceedings of Article 177 EEC, in* EXPERIENCES & PROBLEMS, *supra* note 5, at 114, 117.

109. A.G. Toth, *Observations on Certain Problems Involved in the Application of Article 177 EEC, in* EXPERIENCES AND PROBLEMS, *supra* note 5, at 394, 398.

110. *See Attitude, supra* note 78.

111. Case 166/73, Rheinmuhlen-Dusseldorf v. Einfuhr-und Vorratsstelle fur Getreide, 1974 E.C.R. 33, 1 C.M.L.R. 523, at 526-27 (1974).

112. *Id.*

113. *Id.*

Article 177 EEC is necessary. Nevertheless, by setting stringent guidelines[114] for the lower courts, Lord Denning effectively gave all the power to the House of Lords. The strong language he used implies resentment of the ultimate authority of the ECJ, which "*even* the House of Lords has to bow down to."[115] The trial judge "has complete discretion," according to Lord Denning, and has no obligation to refer "unless he wishes."[116] The appellate judges also have full discretion and "can interpret the treaty themselves if they think fit."[117] Although Lord Denning accepted that discretion stops at the House of Lords, the reason he gave is not that the House of Lords must abide by Article 177 EEC.[118] Instead, he focused on the importance of cases that reach the House and opined that "if a point of interpretation arises there, it is assumed to be *worthy* of reference to the European Court . . . [whereas] points in the lower courts may not be *worth* troubling [the ECJ]."[119] The perceived inferiority of the lower courts is obvious.

Furthermore, throughout much of the opinion, Lord Denning applied "the plain-meaning rule" to Article 177 EEC, interpreting all words subject to interpretation as narrowly and literally as possible.[120] Thus, he made it virtually impossible for a lower court to refer. Then, however, Lord Denning abandoned the "plain meaning rule" and laid down a rule for the English courts to follow when faced with the problem of interpreting EEC law (i.e., treatises, regulations, and directives): "No longer must they examine the words in meticulous detail . . . [or] argue about the precise grammatical sense. [The lower English courts] must look to the purpose or intent [of the document's language]."[121] Consequently, if all these guidelines are combined, the narrow construction of Article 177 EEC

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114. H P Bulmer Ltd. and Shhoerings Ltd. v. Bollinger SA and Champagne Lanson Pere et Fils, 1974 Ch. 401, 3 W.L.R. 202 (1974), 2 All E.R. 1226 (1974).

115. *Id.* at 6 (emphasis added).

116. *Id.* In fact, Lord Denning lists several reasons a judge may give for not referring: "It will be too costly."; "It will take too long to get an answer."; and "I am well able to decide it myself." *Id.*

117. *Id.* at 7.

118. EEC TREATY, *supra* note 4, at art. 177 (mandatory referral in courts from which no national judicial remedy is available).

119. H P Bulmer Ltd. and Shhoerings Ltd. v. Bollinger SA and Champagne Lanson Pere et Fils, 1974 Ch. 401, 3 W.L.R. 202 (1974), 2 All E.R. 1226 (1974).

120. *Id.*

121. *Id.* at 12. Note, however, that Lord Denning, in interpreting Article 177 EEC did exactly the opposite. Does the rule not apply to him or does it not apply to Article 177 EEC?

encourages lower courts to interpret Community law on their own; the expansive guidelines for such interpretation require them to do so "within the spirit of the treaty and . . . if they find a gap, they must fill it as best they can."[122] This encourages the judicial autonomy of the English national judiciary in general and the House of Lords in particular.

2. Precedent

The ECJ is not bound by prior decisions. Thus, the concept of precedent is non-existent in this setting.[123] Although the Court prefers to follow its own decisions, it does depart from them. The principle of precedent, however, does exist the in English common law. The effect on English cases involving EEC law has been an attempt by the courts to reconcile this paradox. In a recent case,[124] after enunciating the basic distinction between following common law precedent in intra-English cases and deciding to do so when considering EEC law, the *Enderby* court held that, as a matter of course, lower courts should allow "litigants to exhaust the appeal procedures within this [United Kingdom's] jurisdiction and to allow the highest appellate court, the House of Lords, to decide whether the matter is properly to be referred to the ECJ."[125] An exception to this general proposition is to be made in England only in limited circumstances.[126] Finally, particular importance must be given to cases in which the House of Lords has already decided that English law and that of the EEC are the same on a given issue.[127] Ergo, the existence of precedent, giving deference to higher courts, is a strong motivating factor to "strip" referral power from the lower courts.

IV. CONCLUSION

The language of Article 177 EEC sets out to promote cooperation between the ECJ and the member states' national courts and tribunals in order to establish uniformity of interpretation of EEC law. In fact,

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122. *Id.*

123. BROWN & JACOBS, *supra* note 1, at 314.

124. Enderby v. Frenchay Health Authority, 1 C.M.L.R. 626 (1991)(Emp. App.Trib., 21 Dec. 1990).

125. *Id.*

126. The rule applies when the issue is manifestly clear-cut and will decide the case, when there is no guidance from higher courts, and when the parties consent. *Id.*

127. *Id.*

paragraph three of Article 177 EEC mandates that every member state's court of last instance refer necessary questions of interpretation of EEC law to the ECJ. This effectively guarantees that all such questions eventually reach the ECJ, and therefore assures continued cooperation between the national and Community judicial bodies as well as uniformity of interpretation of EEC law.

The EEC's effort to promote judicial cooperation and uniformity of legal interpretation is further evidenced by ECJ decisions that encourage Article 177 EEC referrals even when the facts have not been fully ascertained,[128] that reformulate questions on finding the need to do so,[129] and that adopt a broad reading of "necessary" by giving full discretion to national courts.[130] These cases demonstrate that the ECJ does not support the practical arguments set forth in favor of limiting referral power to appellate courts or courts of last instance.

Furthermore, as a matter of principle, no restriction should be made because doing so would impinge on the national judicial sovereignty of the member states. One must also question the true motivation of those judges and commentators who advocate purging the lower courts of the ability to interact directly with the ECJ. Their alleged aim of instituting indirectly a form of docket control for reasons of time, efficiency, or national judicial sovereignty are irrelevant. Irrespective of the reasons proffered, it is not within the scope of their role in the EEC to make these decisions. Furthermore, if the Court is to take this proposition seriously and contemplate depleting its own jurisdictional scope, it must be convinced that doing so would be in the best interest of the Community, not just that of the superior national courts.[131] The evidence, however, simply does not support this inference.

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128. Joined cases 36 & 71/80, Irish Creamery Milk Suppliers Ass'n v. Government of Ireland; Martin Doyle v. An Taoiseach, 1981 E.C.R. 735, 2 C.M.L.R. 455 (1981).

129. *Report, supra* note 13, at 16.

130. *See* Case 283/81, Societe CILFIT et Lanificio di Gavardo v. Ministry of Health, 1982 E.C.R. 3415, 1 C.M.L.R. 472 (1983).

131. *See* Rasmussen, *supra* note 106, at 386.